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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-734

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R.L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S INC.,

Petitioners,

v.

EDGAR E. WHITWORTH, d/b/a DINKIE'S FOOD MART,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM T. JACKS
1206 San Antonio Street
Austin, Texas 78701

Attorney for Respondent, Edgar E. Whitworth, d/b/a Dinkie's Food Mart

Of Counsel:

DOGGETT & JACKS, P.C.

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2. Is an antitrust claim barred on grounds of "standing" merely because the defendants' allegedly anticompetitive conduct has succeeded in making it imposssible under state law for the plaintiff to open his business?

STATEMENT OF THE CASE

This is a private antitrust suit which seeks to force competition on a handful of closely related persons and entities who control both the retail liquor business and the local government of Impact, Texas, a tiny but lucrative " 'oasis' in the middle of a vast expanse of 'dry' territory" in western Texas. (Pet. 26). Impact is comprised of approximately forty-seven acres and was incorporated as a municipality by the petitioner Dallas Perkins in 1961. At that time, the sale of alcoholic beverages was prohibited in neighboring Abilene, a city of over 90,000 people, in Taylor County, and in most surrounding counties. (Pet. 27-29). Shortly after incorporation, a local option election was held, and by a vote of 27-0 the citizens of Impact legalized the sale of all types of alcoholic beverages for off-premises consumption. (Pet. 29). Within six months following that election, the governing body of Impact had enacted three ordinances, the combined effect of which was to restrict the sale of alcoholic beverages to areas within Impact owned or controlled by Mr. Perkins, the petitioner Tom "Pinkie" Roden, or their respective corporate alter egos.[1]

[1] Among these ordinances are one enacted on August 17, 1961, establishing residential limits of Impact, one enacted on September 21, 1961, entitled "An Ordinance Prohibiting the Sale of Beer, Wine, Liquor or Other Intoxicating Beverages Within the Residential Limits of the City of Impact, Texas; and Providing a Penalty," and one enacted December 29, 1961, entitled "Zoning Ordinance for the City of Impact, Texas." (R. 115-16).

At the time this suit was filed, three business establishments were licensed to sell alcoholic beverages on a retail, off-premises basis in Impact, including one owned by Dallas Perkins, one owned by Tom "Pinkie" Roden, and one owned by Pinkie's, Inc. The five-member City Council of Impact at that time included Dallas Perkins, his wife, his father, Dickie W. Maxwell (an employee of the liquor store owned by Pinkie's, Inc.), and Marion Teel (an employee of the liquor store owned by Tom "Pinkie" Roden). (R. 92). All of these persons are named as defendants in both their individual and official capacities.

Impact bears little resemblance to most other cities. Virtually all of its few commercial buildings are used in connection with the sale of Alcoholic beverages; there are no public buildings, churches or schools. (Pet. 29). Whatever its shortcomings as a city, however, Impact has unquestionably been an effective device for the maintaining of a geographical retail liquor monopoly. The nearest location to Impact where alcoholic beverages are sold on a retail basis for off-premises consumption is in Stamford, Haskell County, Texas, which is approximately thirty-eight miles away. Not surprisingly, retail prices of liquor at the three outlets in Impact are significantly higher than in other locations. (R. 92).

On June 16, 1975, the respondent, through his attorney, submitted to the petitioner Nancy Perkins, in her capacity as Secretary of the City of Impact, an Application for a Wine and Beer Retailer's Off-Premises License, which under Texas law must be signed by the City Secretary before being submitted by the applicant to the Texas Alcoholic Beverages Commission. (R. 116,

119). On July 1, 1975, Nancy Perkins responded, stating that because city ordinances prohibited the sale of alcoholic beverages on respondent's lot, where he planned to locate his business, she would not sign the application. (R. 116-17, 124). Because of Nancy Perkins' refusal to sign this application, the respondent is unable to engage in the business of the retail sale of alcoholic beverages in Impact. This action ensued, the respondent claiming, *inter alia*, that the enactment of the ordinances referred to previously and the refusal to sign his application constitute overt acts in furtherance of a conspiracy to restrain competition in the retail sale in Impact of alcoholic beverages for off-premises consumption. (R. 115-17).

On January 29, 1976, the District Court entered a summary judgment for the defendants on the ground that the City's valid zoning ordinance, under which the operation of a liquor business on plaintiff's property is prohibited, bars recovery regardless of whether defendants' actions otherwise violate the antitrust laws. (Pet. 26-27).

The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, holding that "[t]he mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade." (Pet. 18). In addressing the defendants' argument that their conduct was shielded from immunity by the so-called "state action" exemption to the antitrust laws, the court below distinguished *Parker v. Brown*, 317 U.S. 341 (1943), as follows:

> [T]hat case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade". 317 U.S. at 351-352, 63 S.Ct. at 314. That is the question here.

(Pet. 21). While devoting the bulk of its discussion to this Court's recent interpretations of *Parker v. Brown*, the court below cited its own decision in *City of LaFayette v. Louisiana Power and Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, ____ U.S. ____, 97 S.Ct. 1577 (1977), for the proposition that "where the governmental unit concerned is other than a state itself, such as the municipality here, a more thorough analysis is required before *Parker* can be held to apply." (Pet. 23). The court below concluded that, on the basis of the pleadings and the cases interpreting *Parker v. Brown*, it was "unable to say at this early stage that the plaintiff could prove no set of facts which would entitle him to relief." (Pet. 23).

REASONS FOR DENYING THE PETITION

1. Because of the bizarre facts of this case, it bears little relationship to the *City of LaFayette* case, and its disposition will have no pervasive effects.

In an effort to persuade this Court to grant its discretionary writ, petitioners attempt both to link arms with the City of LaFayette and to catalogue a host of horribles that, they say, would flow from the decision of the court below. (Pet. 5-9). However, the facts alleged in the plaintiff's pleadings and contained in the

summary judgment record are so bizarre that this case bears little relationship to the *City of LaFayette* case, and its disposition can hardly have the pervasive ill effects claimed.

It is not being facetious to suggest that the City of Impact and the City of LaFayette share virtually nothing in common but the same first name. Certainly the circumstances differ regarding the question whether their respective cases should be considered by this Court. The *City of LaFayette* case involves the troublesome, pervasive, and recurrent problem of the competitive relations between municipal and private utilities, a problem which has previously demanded the attention of this Court in other contexts. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). It was represented to the Court during the oral argument of the *City of LaFayette* case that between 1700 and 2000 operating municipal electric systems exist in the United States, an indication of the widespread importance of the issues raised therein. *City of LaFayette v. Louisiana Power & Light Co.*, No. 76-864, October Term, 1976, Oral Arg. at 10-11 (Oct. 4, 1977).

By contrast, one would be hard-pressed to find any other municipality in the United States comparable to the City of Impact, where government is literally of, by, and for the handful of individuals and entities named as defendants herein. The disposition of this case will affect no one other than the litigants and the liquor-consuming public of Abilene, Texas. Thus, the claimed identity of issues between petitioners and the City of LaFayette is illusory.[2]

[2] It should also be noted that, despite petitioners' assertions to the contrary, (Pet. 5-6), the Fifth Circuit's decision in the *City of LaFayette* case was hardly the linchpin of its analysis in this case. (Pet. 20-23).

Petitioners' attempts to inflate the importance of this case by decrying the claimed disruptive effects of the decision below must fail for the same reasons. Petitioners insist that, by virtue of the Fifth Circuit's decision, parties to zoning cases will now rush headlong into federal court (without pausing for such local formalities as applying for a variance or for the amendment of the zoning ordinance). The federal courts will than "become zoning appeals boards," we are told, (Pet. 9), and begin prying into the underlying motives and intent of municipal officials. (Pet. 7-9).

Petitioners are wrong. Only in a case in which, as here, it is alleged that the enactment of the zoning ordinance was itself an act in furtherance of a private scheme to violate the antitrust laws could the result below obtain. The rarity with which such an allegation is likely to be made is indicated not only by the peculiar facts of this case, but also by the fact that no other reported case has been found in which, in the almost ninety years of the Sherman Act's existence, a similar assertion has been advanced. If such a claim is advanced in any future case that lacks the extreme anticompetitive features of the case at bar, then the later case should be readily distinguishable on its face and the remedy denied.

2. The decision of the court below is consistent with this Court's rulings in *Parker v. Brown* and its progeny.

Petitioners' position respecting the "so-called state action exemption"[3] is capsulized in their assertion that

[3] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788.

"the enactment of the City of Impact's general zoning ordinance and the refusal of the City Secretary to falsely certify the Respondent's application for a liquor license flowed directly from the statutes of the State of Texas." (Pet. 11). Therein, they claim, lies their immunity from the application of the Sherman Act. However, petitioners' argument ignores the factual allegations of the amended complaint and summary judgment record and misconstrues this Court's pertinent decisions.

In *Parker v. Brown*, 317 U.S. 341 (1943), a private grape grower and packer challenged the administration by California officials of a legislatively mandated raisin marketing program which had anticompetitive effects. Assuming for purposes of its decision that the program would violate the Sherman Act if conducted by private individuals, the Court nevertheless held the actions of the state officials to be outside the reach of the antitrust laws. The Court stated that there is

> nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature*. (Emphasis added).

However, the Court expressly reserved for later decision the "question of the state or its municipality becoming a *participant* in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (emphasis added). Further, the Court noted:

> *The state* in adopting and enforcing the prorate program made no contract or agreement and *entered into no conspiracy in restraint of trade or to establish monopoly*, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. (Emphasis added).

317 U.S. at 352.

The suggestion of the Court in *Parker* that a contrary result would be indicated if allegations were made of participation by public officials in a private conspiracy has been borne out in later decisions of this Court.[4] In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court found no governmental immunity where the complaint alleged that the defendant parent company had conspired with one of its subsidiaries, the officially appointed buying agent for an arm of the Canadian government, to prevent plaintiff's competing for the Canadian business. Later, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the *Continental Ore* decision was cited for the proposition that "conspiracy with a licensing authority to eliminate a competitor may . . . result in an antitrust transgression."

Still more recently, the same principle was announced in *Goldfarb v. Virginia State Bar, supra*

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[4]The lower courts have also held that public officials who participate in private schemes to violate the antitrust laws are thereby deprived of any state action immunity. *See Duke & Co., Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Herman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964) [also cited for the above proposition by this Court in *California Motor Transport Co.*, 404 U.S. 513 (1972)], *Windham v. American Brands, Inc.*, 1975-2 Trade Cases ¶60,530 (S.D.S.C. 1975); *Azzaro v. Town of Branford*, 1974-2 Trade Cases ¶75,337 (D. Conn. 1974); *Fox v. James B. Beam Distilling Co.*, 1974-2 Trade Cases ¶75,375 (S.D. Ind. 1974).

note 3. In *Goldfarb*, consumers of legal services sued the Virginia State Bar, a state agency. They claimed that the Bar had violated the Sherman Act by issuing "suggested" minimum fee schedules which were adopted in substance by local bar associations, and by issuing ethical opinions enforcing the local fee schedules. The Court observed:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 567, 578-579 (1973). *The State Bar*, by providing that deviation from County Bar minimum fees may lead to disciplinary action, *has voluntarily joined in what essentially is a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.* (Emphasis added). (Footnote omitted).

421 U.S. at 792.

In short, this Court has consistently held that, whatever the usual antitrust liabilities of a public official, no immunity is offered when he undertakes to participate in a private conspiracy with others to violate the antitrust laws. The petitioners herein are alleged to have engaged in both their official and individual capacities in a private conspiracy for private gain and, accordingly, may be held accountable under the Sherman Act.

Apart from its consistency with the decisions of this Court respecting the liability of public officials who engage in private antitrust conspiracies, the Court of Appeals' holding is also totally compatible with other aspects of this Court's rulings in *Parker v. Brown* and

its descendants. One such other factor that has always been carefully scrutinized by this Court has been the degree of involvement of the state acting as a sovereign. The above-quoted language from *Parker* makes clear that the Court regarded it as a case in which the state legislature had itself mandated the anticompetitive conduct complained of.[5] In *Goldfarb*, on the other hand, the requisite degree of state involvement was found lacking despite the statutory status of the State Bar as a state agency. There the Court stated:

> Although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondent's activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objectives of the ethical codes. In our view that is not state action for Sherman Act purposes. It is

[5] The *Parker* requirement that the anticompetitive conduct be mandated by the state has been repeatedly emphasized by this Court. *See Goldfarb v. Virginia State Bar, supra* note 3, 421 U.S. at 790; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) (referring to *Parker* as a case of "mandatory" state regulation and refusing to find governmental immunity where there was no evidence of express governmental approval of the conspiracy in which a defendant government agent allegedly participated); *Schweggman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (referring to *Parker* as a case in which "a state *compels* retailers to follow a parallel price policy and *demands* private conduct which the Sherman Act forbids") (emphasis added).

> not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as a sovereign.* (Emphasis added).

Similarly, in this case, while all municipalities in Texas have been given statutory authority to regulate zoning and liquor sales, their activities in that connection – including, certainly, those of petitioners – are neither required by the State nor approved by it after the fact.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), a retail druggist sued a private utility claiming that it used its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The utility furnished its residential customers, without additional charge, with almost fifty percent of the most frequently used light bulbs under a program approved, as part of its rate structure, by the Michigan Public Service Commission. The practice could not be changed by the utility under state law without its filing, and the Commission's approving, a new tariff. Despite those facts, the Court held that the state action defense was not available.

While *Cantor* is not, perhaps, directly applicable to this case since it did not involve a suit against governmental officials, its teachings are important in two respects. First, a majority of the Court reiterated "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." 428 U.S. at 592-93. Secondly, the Court held that the federal antitrust laws may be applied in areas of the economy pervasively regulated by the state. *Id.* at 595. In that connection, the

majority observed that the regulated conduct would not necessarily be required thereby to satisfy inconsistent standards, and stated that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's". *Id.* Thus, in the present case, the fact that the State of Texas may have authorized municipalities generally to regulate zoning and liquor matters cannot, of itself, insulate the petitioners from antitrust liability for their own conspiratorial acts.

The decision of the court below is consistent, too, with the holding of this Court in *Bates v. State Bar of Arizona*, ____ U.S. ____, 97 S.Ct. 2691, (1977). There the Court noted that the challenged restraint – a prohibition against advertising by attorneys – was occasioned by "the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B)." Since the Arizona Supreme Court was "the ultimate body wielding the State's power over the practice of law" and "the real party in interest," the restraint was held to be, in the language of *Goldfarb*, " 'compelled by direction of the State acting as a sovereign.' " 97 S.Ct. at 2697 (citation omitted). Moreover, the Court noted that the Arizona State Bar operated under the "continuous supervision" of the State's Supreme Court, *id.*, and that "the rules are subject to pointed re-examination by the policy maker – the Arizona Supreme Court – in enforcement proceedings." *Id.* at 2698. The Court concluded:

> Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so

clearly and affirmatively expressed and that the State's supervision is so active.

Id.

Despite petitioners' contention that the mere existence of Texas statutes authorizing municipalities to enact zoning ordinances and regulate liquor store locations brings this case within the sheltering ambit of *Bates*, it is clear that the two cases are distinguishable. First, unlike the State Bar in *Bates*, the municipality here is under no mandate from the State to impose the restraint in question. Secondly, whereas the Supreme Court of Arizona was continually provided with the opportunity to review in grievance cases the implementation of its mandate by the State Bar, here there is no occasion for the State of Texas to review the exercise by the City of Impact of its authority to regulate zoning and liquor matters. Finally, the record in the case at bar does not indicate the existence of any supervision by the State, whereas in *Bates* the "continuous" and "active" supervision provided by the Arizona Supreme Court was stressed repeatedly.

In summary, the decision of the court below is entirely consistent with the rulings of this Court concerning the state action immunity enjoyed by public officials in very limited circumstances. Accordingly, review by this Court is unwarranted.

3. The decision of the court below does not conflict with decisions of other circuits concerning the standing required of plaintiffs in antitrust cases.

Employing a "Catch-22" brand of logic, the petitioners make much of the fact that the respondent did not purchase his lot in Impact until after the enactment of ordinances precluding the use of that lot for the retail sale of liquor. Petitioner cannot have been "injured in his business or property,"[6] they reason, "because so long as the valid zoning ordinance prevents the sale of liquor at that location he cannot obtain the necessary license from the State." (Pet. 14). This argument overlooks that the petitioner has alleged that the enactment of the zoning ordinance that precludes his entering the liquor business was itself an act in furtherance of the antitrust conspiracy of which he complains. Since it is the validity of that official action under the antitrust laws which is at issue in this case, it can hardly be said that the existence of that ordinance and the legal stumblingblock it imposes can deprive the respondent of standing to make his antitrust challenge. The antitrust cases cited by petitioners, *see* Pet. at 15, are distinguishable because in those cases the impossibility of the plaintiffs' entering business was not occasioned by the challenged restraint, but by other circumstances.[7]

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[6] *See* 15 U.S.C. §15.

[7] In addition to the antitrust cases cited by the petitioners at page 15 of the Petition, the cases of *Clouser v. David*, 309 F.2d 233 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), and *C.F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir. 1974), are cited and discussed in the Petition at page 13. These cases, too, are distinguishable, because neither involves a situation where, as here, the enactment of the zoning ordinance was claimed to be an act in furtherance of a conspiracy to violate the antitrust laws.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DOGGETT AND JACKS, P.C.
1206 San Antonio
Austin, Texas 78701

By: WILLIAM T. JACKS

Attorneys for Respondent
Edgar E. Whitworth,
d/b/a Dinkie's Food Mart